IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 18, 2007

WILLIE JOE FRAZIER v. STATE OF TENNESSEE

Appeal from the Circuit Court for Marshall County
No. 17095 Robert Crigler, Judge

No. M2006-02265-CCA-R3-PC - Filed April 15, 2008

The petitioner, Willie Joe Frazier, appeals from the Marshall County Circuit Court's dismissal of his petition for post-conviction relief, claiming that his convictions in that court were the result of the ineffective assistance of counsel and that the post-conviction court erred in denying a post-hearing motion to amend the petition. The record supports the denial of relief in this case, and we affirm the circuit court's order.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Hershell D. Koger, Pulaski, Tennessee, for the appellant, Willie Joe Frazier.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On March 17, 2006, the petitioner filed a petition for post-conviction relief to challenge his 2003 Marshall County jury convictions of malicious shooting, assault with intent to commit voluntary manslaughter, assault with intent to commit first degree murder, aggravated assault, and six counts of armed robbery.

This court's opinion in *State v. Willie Joe Frazier*, No. M2003-03014-CCA-R3-CD (Tenn. Crim. App., Nashville, July 26, 2005), *perm. app. denied* (Tenn. Dec. 19, 2005), the petitioner's direct appeal, provided a synopsis of the facts underlying the petitioner's convictions:

> The evidence at trial established that on October 11, 1980, the [petitioner], along with Jerry Fails and Diane Grooms, entered H &

S Pharmacy in Lewisburg soon after the store's 8:00 a.m. opening. Fails was armed with a 16-gauge pump shotgun, and the [petitioner] carried a pistol. The trio herded store clerk Ann Worley, seventeen-year-old employee Richard Tate, pharmacist Sam Shelton, bookkeeper Judy Pigg, and eighty-one-year-old deliveryman Ollie Bagley, along with customers, Jackie Lowe, Dorothy Collins, Goldie Crabtree, Billy Pugh, and Pugh's grandniece at gunpoint to a small office at the back of the store. After escorting the victims to the office, Fails announced that everyone would be shot. Later Fails apparently reconsidered and told the victims that they would be tied up. However, when the assailants ran out of rope, the victims were again informed that they would be shot. Fortunately, additional bindings were found. At trial, Worley, Tate, Pigg, Pugh, and Collins testified that after being ordered to lie on the floor, their jewelry and wallets were taken. The [petitioner] told Worley that if she didn't take her rings off, he would cut off her fingers. Bagley was kicked to the floor and "stomped" in the head. Lowe testified that no money was taken from her person. When Pugh's eighteen-month-old grandniece began to cry, Fails directed the [petitioner] to kill the child, but the [petitioner] refused. While Fails and Grooms were in the pharmacy area of the store stealing narcotics and a bank deposit bag containing money, the [petitioner] remained in the office with the victims.

Richard and Judy Watson arrived at H & S Pharmacy while the robbery was still in progress. Mr. Watson left his wife in the car while he went inside the store to purchase a birthday card. As Mr. Watson was reading cards, Fails approached and pointed a gun at him. Fails then ordered Watson to "come here," and, upon compliance, Fails placed the gun barrel next to Watson's left thigh and pulled the trigger. The shotgun injury required amputation of the leg. Grooms told the [petitioner] and Fails, "[Watson] has a wife or a girlfriend in the car," and one of the men responded, "we have got to get her in here." In the meantime, Mrs. Watson, tired of waiting for her husband, decided to go inside the pharmacy to investigate his delay. As she stepped out of her vehicle, Mrs. Watson saw the [petitioner] and Grooms carrying a large box from the store. Grooms looked back in the store, smiling and waving, and said, "see you later." As Mrs. Watson entered the store and walked toward the card section, Fails pointed a shotgun at her and said, "I got your God damn husband, and you are going to be next, you white bitch." After she saw her husband lying in a pool of blood, she was pulled past the office and into the storage area where Fails told her to lie down and

> then proceeded to shoot her in the right leg. The trio then fled in Grooms' automobile.
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> Jackie Green, a deputy sheriff with the Marshall County Sheriff's Department, was on routine patrol in a vehicle unequipped with a police radio when he noticed an older model, dark green Buick with Alabama tags speeding down West Commerce. The car eventually pulled over on the shoulder of the road, and Green pulled behind it. Fails, who was in the passenger seat of the car, exited the vehicle and fired two shots at Green, shattering his windshield. Fails then got back in the car, and sped away. Unable to radio for backup, Green stopped at a gas station and called the sheriff's department. Grooms' abandoned vehicle was found several miles away. Soon thereafter, detectives with the Lewisburg Police Department found the [petitioner] hitchhiking a short distance from the abandoned vehicle. His accomplices were arrested the next day.
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> While awaiting trial in the spring of 1981, the [petitioner] escaped from the Marshall County Jail. In September 2002, the [petitioner] was stopped by a Vancouver, Washington police officer for a cracked windshield. A routine computer check of the [petitioner's] driver's license ultimately led to his arrest and return to Marshall County, Tennessee.

Willie Joe Frazier, slip op. at 2-3.

In *Willie Joe Frazier*, this court held that the evidence was insufficient to support the convictions of assault with intent to commit the robberies of Ollie Bagley and Goldie Crabtree; these convictions were reduced to aggravated assault. *Id.*, slip op. at 6. This court also held that "double jeopardy principles preclude dual convictions for assault with intent to commit voluntary manslaughter and malicious shooting"; these convictions were merged into a surviving conviction of malicious shooting. *Id.*, slip op. at 8.

According to the conviction judgments in the record, the petitioner received life sentences for each of the six armed robbery convictions.

In his post-conviction petition, the petitioner claimed that his convictions were the result of ineffective assistance of counsel in that counsel failed to "(a) challenge the states [sic] jurisdiction whether the warrants had been properly reserved for prosecution; (b) provided inaccurate legal advise [sic] concerning whether he would be subjected life sentences on the armed robber[y] offences [sic]." The post-conviction court appointed counsel for the petitioner, and counsel amended the petition to include the following instances of ineffective assistance of counsel: counsel's failure to object to evidence about the petitioner's escape from jail, failure to comprehend

the applicable proscriptive and punitive statutes, failure to object to the verdict forms employed by the trial court, and failure to present and preserve for appeal the petitioner's "ex post facto and cruel and unusual punishment issues." The amended petition also claimed that the trial court violated the petitioner's right to avoid ex post facto prosecution by applying the incorrect sentencing law, that the life sentences were cruel and unusual punishment, and that the petitioner should have been sentenced as a Range I offender on the armed robbery convictions.

The post-conviction court conducted an evidentiary hearing on October 6, 2006.

In the hearing, the petitioner testified that, despite his request of trial counsel, counsel did not raise the issue of the "charging instrument" not being "properly preserved for prosecution." He testified that, during his absence while on escape, the State ceased reissuing his arrest warrants in 1990. On cross-examination, the petitioner admitted, however, that he was indicted on the various charges in his case on November 5, 1980, prior to his escape from jail in July 1981.

The petitioner testified that he asked his trial counsel to prevent the prosecutor from referring to the petitioner's escape from jail. He testified that counsel failed to object to the State's referring to the escape and that counsel led him to believe that the issue could not be raised. He testified that he had never been charged much less convicted of escape. On cross-examination, he admitted that the trial court instructed the jury that the petitioner's flight could be considered by the jury in determining the petitioner's guilt.

The petitioner testified that, beginning with his initial appearance in the trial court, counsel informed him that he could not be sentenced to life imprisonment or to a term of 99 years, even though the petitioner believed that co-defendants Fails and Grooms had received 99 years and life, respectively. He testified that counsel failed to adequately or accurately inform him of his liability for punishment. He testified that after he complained to the Board of Professional Responsibility, counsel wrote him and outlined the applicable sentencing ranges he was facing. Because, in reliance upon the letter, he believed he would be classified as a Range I offender with a 30 percent release eligibility, he rejected the State's plea offer of 75 years at 100 percent. The petitioner testified that he believed the Range I classification would govern the charges of armed robbery and that he would be subject to a sentencing range from eight to 12 years on each of those charges. He testified that he did not understand that the jury would fix the punishment or that he faced more severe punishment, including life sentencing, until the trial judge informed him after the jury returned guilty verdicts and the court had embarked upon a jury-sentencing hearing. The petitioner testified that "it was a shock to me" and that "[m]y lawyer was as surprised as I was." He testified that he would have "settled the case" had he known about jury sentencing and the potential for life sentences.

The petitioner further testified that the verdict forms used by the trial court were inadequate because they were subscribed by only the jury foreperson.

The petitioner testified that, at the time of his trial, he did not understand ex post facto principles as applied to his case.

Lead trial counsel testified in the evidentiary hearing for the State that the lack of re-issuances of the arrest warrants was not an issue because the petitioner had been indicted.

Trial counsel testified that, prior to trial, she realized that the 1980 sentencing law could apply, as could either the 1982 law or the 1989 law. She testified that, four to six months before trial, she ultimately determined that, because of the 1989 savings statute, Tennessee Code Annotated section 40-35-117, the 1980 law would apply.[1] She testified that she informed the petitioner that she believed the 1980 law would mandate jury sentencing and that life sentences for armed robbery could be imposed. Counsel testified that, initially, the trial judge disagreed that the l980 law would apply and espoused comparative sentencing pursuant to the l982 and l989 sentencing provisions with the least severe sentence prevailing. The petitioner wanted counsel to accede to this determination, and counsel complied with the petitioner's wish in this respect. Ultimately, however, the trial judge changed his mind and opted to apply the 1980 law.

Trial counsel testified that the State never actually made a formal plea offer. She recalled that, pursuant to the petitioner's request, she submitted a proposal that yielded an effective sentence of 8 to 10 years at 30 percent and that the State promptly rejected it. She testified that the State wanted something along the lines of 20 to 24 years in "actual service time." The petitioner rejected any possibility of pursuing a plea along these lines, although he agreed to submit an offer of 15 years at 30 percent, which the State also rejected. The petitioner expressed his belief that he would be acquitted of some of the charges. Counsel testified that, prior to trial, she explained the 1980 law to the petitioner and told him that he was gambling with life sentences by proceeding to trial.

Counsel testified that, between trial and sentencing, and with the knowledge that life sentences were in the offing, the petitioner authorized a plea proposal of 30 years at 30 percent, but the State was resolute about actual time served being in the range of 24 years. She testified that, even after the trial judge had determined to apply the l980 law, "Mr. Frazier still refused to make any kind of an offer that would even come close to what we thought the State was going to settle it on."

Counsel recalled that she had researched the 1980 provision for life sentencing for armed robbery and had found cases that indicated that such punishment was not cruel or unusual.

Two attorneys who served as associate trial counsel in the petitioner's case testified to specific details of lead trial counsel's testimony.

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[1] Tennessee Code Annotated section 40-35-227(c) provides, "For all persons who committed crimes prior to July 1, 1982, prior law shall apply and remain in full force and effect in every respect, including, but not limited to, sentencing, parole and probation."

Following the testimony in the evidentiary hearing, the petitioner orally moved to amend the petition to include a claim that he was denied due process of law when the trial court assured him that it would compare the 1980, 1982, and 1989 sentencing laws and would apply the regime that was the most lenient, only to later abandon this scheme in favor of sentencing via the 1980 law.

The post-conviction court found that the testimony of the trial lawyers was credible and belied any claim of ineffective assistance of counsel. The court denied post-conviction relief.

Now on appeal, the petitioner claims that he established ineffective assistance of trial counsel and that the post-conviction court erred in denying his post-hearing motion to amend the petition.

Because the post-conviction petition in the present case was filed after May 10, 1995, regardless of the date of the underlying offenses, the applicable post-conviction standard of proof is clear and convincing evidence. *See* T.C.A. § 40-30-110(f) (2003); *McConnell v. State*, 12 S.W.3d 795, 800 n. 2 (Tenn. 2000). On appeal, the appellate court affords the trial court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997).

The Sixth Amendment to the United States Constitution and Article I, section 9 of the Tennessee Constitution both require that a defendant in a criminal case receive effective assistance of counsel. *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975). When a defendant claims ineffective assistance of counsel, the standard applied by the courts of Tennessee is "[w]hether the advice given or the service rendered by the attorney [is] within the range of competence demanded by attorneys in criminal cases." *Summerlin v. State*, 607 S.W.2d 495, 496 (Tenn. Crim. App. 1980).

In *Strickland v. Washington*, the United States Supreme Court outlined the requirements necessary to demonstrate a violation of the Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). First, the petitioner must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and must demonstrate that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Constitution. *Id.* at 687, 104 S. Ct. at 2064. Second, the petitioner must show that counsel's performance prejudiced him and that errors were so serious as to deprive the petitioner of a fair trial, calling into question the reliability of the outcome. *Id.*; *Henley*, 960 S.W.2d at 579.

The court does not "second guess" tactical and strategic choices pertaining to defense matters and does not measure a defense attorney's representation by "20-20 hindsight." *Henley*, 960 S.W.2d at 579 (quoting *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)). Rather, a court reviewing counsel's performance should "eliminate the distorting effects of hindsight . . . [and] evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

"The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). On the other hand, "deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation." *Id.*

To establish prejudice, a party claiming ineffective assistance of counsel must prove a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

In the present case, the petitioner's appellate claim of ineffective assistance of counsel rests solely upon the allegation that counsel failed to adequately or properly advise the petitioner about the applicable sentencing law. He asserts in his brief that "defense counsel's advice should not have been determined by . . . the trial court's [original] opinion . . . on the proper sentencing scheme – but rather, what the law was." The petitioner does not claim that the trial court erred in ultimately applying the 1980 law.

Trial counsel's testimony, which was accredited by the post-conviction court, established that the defense team determined prior to trial that the 1980 law applied to the case and that counsel so informed the petitioner. Counsel also testified that, when the trial court expressed an intention to comparatively apply the 1982 and 1989 versions of the sentencing law, counsel told the petitioner that the trial court's view may not prevail; however, the petitioner liked the view espoused by the trial court and told counsel, in essence, not to "rock the boat." With the post-conviction court's accrediting counsel's testimony, we cannot say that deficient performance was shown or, even if it had been shown, that the petitioner was prejudiced by the dispute about the applicable law. Based upon counsel's testimony, the petitioner was unwilling to consider any plea proposal near the range that the State consistently demanded, and moreover, "[t]here is no right to plea bargain." *State v. Gillespie,* 898 S.W.2d 738, 740 (Tenn. Crim. App. 1994); *State v. Craig Stephen Bourne*, No. 03C01-9807-CR-00237, slip op. at 8-9 (Tenn. Crim. App., Knoxville, Oct. 18, 1999).

Next, the petitioner claims that the post-conviction court erred in denying his post-hearing motion to amend the petition to include a claim of violation of due process associated with the trial judge's changing his mind about the applicable sentencing law. Apparently, the motion to amend was prompted by the testimony of one of the associate trial attorneys that, at the time of trial, the trial judge had expressed an intention, in the event of conviction, to apply the more lenient of the three possible sentencing regimes.

Before an evidentiary hearing is conducted, a post-conviction petitioner has statutory opportunities to amend the petition. *See* T.C.A. §§ 40-30-106(d), -107(b)(2); *see also* Tenn. Sup. Ct. R. 28, § 6(C)(2). Indeed, in the present case, the petitioner through his appointed counsel availed himself the opportunity to amend pursuant to section 40-30-107(b)(1). At the hearing, the

post-conviction court must freely allow amendments to the petition "when the presentation of the merits of the cause will otherwise be subserved." Tenn. Sup. Ct. R. 28, § 8(D)(5).

We cannot say that the post-conviction court erred in denying leave to amend the petition. The post-conviction judge aptly commented that any issues raised by the testimony of associate trial counsel had been raised by the petition and by previous testimony. We agree. The denial of a further amendment to the petition was not detrimental to the presentation of the merits of the cause.

In view of the record and our analyses, we affirm the order of the post-conviction court.

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JAMES CURWOOD WITT, JR., JUDGE